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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JULIO ALFONSO RUIZ-MONTANO, Defendant.	Criminal Case No. 08CR0541-WQH Date: April 18, 2008 Time: 1:00 p.m. The Honorable William Q. Hayes **UNITED STATES' NOTICE OF MOTIONS AND MOTIONS FOR** **1) FINGERPRINT EXEMPLARS** **2) RECIPROCAL DISCOVERY** **3) LEAVE TO FILE FURTHER MOTIONS**

The plaintiff, UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and Joseph J.M. Orabona, Assistant United States Attorney, hereby files its Motions For Fingerprint Exemplars, Reciprocal Discovery and Leave to File Further Motions. These motions are based on the files and records of this case, together with the attached statement of facts.

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I

STATEMENT OF THE CASE

On February 27, 2008, a federal grand jury in the Southern District of California returned an Indictment charging Julio Alfonso Ruiz-Montano ("Defendant") with one count of attempted entry after deportation, in violation of 8 U.S.C. § 1326(a) and (b). On February 28, 2008, Defendant was arraigned on the Indictment and pled not guilty. The Court set a motion hearing for April 18, 2008. On March 28, 2008, Defendant filed his discovery motions. The United States files the following motions for fingerprint exemplars, reciprocal discovery, and leave to file further motions.

II

STATEMENT OF FACTS

A. OFFENSE CONDUCT

On February 2, 2008, at approximately 10:15 p.m., United States Border Patrol Agent E. Uskokovic was informed by a Remote Video Surveillance System Operator that three individuals were climbing over the international boundary fence approximately 3.5 miles east of the Calexico Port of Entry. The Remote Surveillance Operator maintained constant visual of the suspects and provided Agent Uskokovic with the location of the individuals. Agent Uskokovic searched the area and found three individuals attempting to conceal themselves behind some brush. All three individuals, including one later identified as Julio Alfonso Ruiz-Montano ("Defendant"), admitted to being citizens and nationals of Mexico with no documents to be in the United States legally. All three individuals were arrested and transported to the Calexico Border Patrol Station for processing.

B. DEFENDANT'S IMMIGRATION HISTORY

A routine records check confirmed that Defendant is a citizen and national of Mexico, and that defendant subsequently was lawfully excluded, deported, and removed from the United States to Mexico. An immigration judge ordered Defendant excluded, deported, and removed from the United States to Mexico on September 5, 2002. After the last time Defendant was lawfully ordered excluded, deported, and removed from the United States, there is no evidence in the reports and records maintained by the Department of Homeland Security that Defendant applied to the U.S. Attorney General or the Secretary of the Department of Homeland Security to lawfully return to the United States.

C. DEFENDANT'S CRIMINAL HISTORY

Defendant has a criminal history. The United States, propounds that Defendant has five criminal history points placing him in Criminal History Category III. On July 22, 1998, Defendant pled guilty and was convicted of assault with a deadly weapon, to wit, a firearm, in violation of California Penal Code § 245(a)(2), and was sentenced to a total of 5 years in prison.

III

UNITED STATES' MOTIONS

A. MOTION FOR FINGERPRINT EXEMPLARS

The United States requests that the Court order that Defendant make himself available for fingerprinting by the United States' fingerprint expert. See United States v. Ortiz-Hernandez, 427 F.3d 567, 576-77 (9th Cir. 2005) (Government may have defendant fingerprinted and use criminal and immigration records in Section 1326 prosecution). Identifying physical characteristics, including fingerprints, are not testimonial in nature and the collection and use of such evidence would not violate Defendant's Fifth Amendment right against self-incrimination. United States v. DePalma, 414 F.2d 394, 397 (9th Cir. 1969). See also Schmerber v. California, 384 U.S. 757, 761 (1966) (withdrawal of blood is not testimonial).

B. MOTION FOR RECIPROCAL DISCOVERY

The United States hereby requests Defendant deliver all material to which the United States may be entitled under Fed. R. Crim. P. 16(b) and 26.2.

1. Defendant's Disclosures Under Fed R. Crim. P. 16(b)

On March 28, 2008, Defendant invoked Fed. R. Crim. P. 16(a) in his discovery motion and the United States has voluntarily complied and will continue to comply with the requirements of Fed. R. Crim. P. 16(a). As of the date of this Motion, the United States has produced 53 pages of discovery (including reports of the arresting officers and agents, a criminal history report, documents concerning Defendant's prior convictions and immigration history), 1 DVD-ROM containing Defendant's videotaped, post-arrest statement, and 3 tapes containing an audio recording of the Defendant's deportation hearing before an immigration judge on September 5, 2002. As of the date of this Motion, the United States has **not** received any reciprocal discovery from Defendant. Therefore, the United

States invokes Fed. R. Crim. P. 16(b), requiring that reciprocal discovery be provided to the United States.

The United States hereby requests Defendant permit the United States to inspect, copy, and photograph any and all books, papers, documents, photographs, tangible objects, or make copies of portions thereof, which are within the possession, custody or control of Defendant and which Defendant intends to introduce as evidence in his case-in-chief at trial.

The United States further requests that it be permitted to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, which are in the possession or control of Defendant, which he intends to introduce as evidence-in-chief at the trial, or which was prepared by a witness whom Defendant intends to call as a witness. Because the United States will comply with Defendant's request for delivery of reports of examinations, the United States is entitled to the items listed above under Fed. R. Crim. P. 16(b)(1). The United States also requests that the Court make such order as it deems necessary under Fed. R. Crim. P. 16(d)(1) and (2) to ensure that the United States receives the discovery to which it is entitled.

2. Witness Statements Under Fed. R. Crim. P. 26.2

Fed. R. Crim. P. 26.2 requires the production of prior statements of all witnesses, except a statement made by Defendant. Fed. R. Crim. P. 26.2 requires reciprocal production of statements, in accordance with the Jencks Act.

The timeframe established by Fed. R. Crim. P. 26.2 requires the statement to be provided after the witness has testified. In order to expedite trial proceedings, the United States hereby requests Defendant be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the Court. Such an order should include any form in which these statements are memorialized, including but not limited to, tape recordings, handwritten or typed notes and/or reports.

C. MOTION FOR LEAVE TO FILE FURTHER MOTIONS

Should new information or legal issues arise, the United States respectfully requests the opportunity to file such further motions as may be appropriate.

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IV

CONCLUSION

For the foregoing reasons, the United States requests the Court grant the United States' Motions for Fingerprint Exemplars, Reciprocal Discovery and Leave to File Further Motions.

DATED: April 9, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ *Joseph J.M. Orabona*
JOSEPH J.M. ORABONA
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JULIO ALFONSO RUIZ-MONTANO, Defendant.	Criminal Case No. 08CR0541-WQH **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that:

I, Joseph J.M. Orabona, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **The United States' Notice of Motions and Motions for Fingerprint Exemplars, Reciprocal Discovery, and Leave to File Further Motions** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Diane Marie Regan
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Lead Attorney for Defendant

A hard copy is being sent to chambers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 2008.

/s/ *Joseph J.M. Orabona*
JOSEPH J.M. ORABONA
Assistant United States Attorney